

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In the Matters of |) | |
| |) | |
| GEODESIC NETWORKS, LLC |) | File No. 0006213843 |
| |) | |
| Application for a Fixed Point-to-Point Microwave |) | |
| License at Naperville, Illinois |) | |
| |) | |
| AUBURN DATA SYSTEMS, LLC |) | File Nos. 0006261839, 0006261845 |
| |) | |
| Applications for Fixed Point-to-Point Microwave |) | |
| Licenses at Naperville, Illinois and Darien, Illinois |) | |
| |) | |

MEMORANDUM OPINION AND ORDER AND ORDER ON RECONSIDERATION

Adopted: September 2, 2014

Released: September 3, 2014

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order and Order on Reconsideration*, we address a microwave frequency coordination dispute between Auburn Data Systems, LLC (Auburn) and Geodesic Networks, LLC. Specifically, we deny Auburn's request to reconsider the grant of Private Operational Fixed Microwave Point-to-Point license WQTX438 to Geodesic. We also grant Geodesic's request that we dismiss Auburn's applications for new Private Operational Fixed Service (POFS) Microwave Point-to-Point licenses at Naperville, Illinois and Darien, Illinois and direct dismissal of those applications.

II. BACKGROUND

2. The 5925-6425 MHz band is currently available for assignment to stations in the Common Carrier Fixed Point-to-Point Microwave Service and the POFS Point-to-Point Microwave Service.¹ Approximately a half-dozen companies, including Auburn and Geodesic, compete to offer private fixed point-to-point microwave service over the same routes between the Chicago area and northern New Jersey.²

3. Part 101 includes the POFS³ and the Common Carrier Operational Fixed Service.⁴ The Commission's licensing regime for these two services requires frequency coordination and the filing of an application for each microwave link or path containing detailed information concerning the proposed operation.⁵ In order to complete frequency coordination, an applicant must give prior notice to nearby licensees and other applicants for licenses of the proposed applicant's operations, make reasonable efforts

¹ See 47 C.F.R. § 101.101.

² See Opposition to Petition to Deny, Auburn Data Systems, LLC (filed June 3, 2014) (Auburn Opposition) at 2.

³ See Part 101, Subpart H.

⁴ See Part 101, Subpart I.

⁵ See 47 C.F.R. §§ 101.21(f), 101.103.

to avoid interference and resolve conflicts, and certify to the Commission that the proposed operation has been coordinated.⁶ Once the applicant has completed frequency coordination, the applicant must file an application for authorization with the Commission, specifying the latitude and longitude of the transmitter to be used to an accuracy of one second.⁷

4. On October 24, 2011, Auburn sent a Prior Coordination Notice (“PCN”) attempting to coordinate a microwave path in the 6 GHz band between Aurora, Illinois and Darien, Illinois.⁸ Auburn sent letters renewing the PCN on April 23, 2012, October 4, 2012, September 13, 2013, and March 12, 2014.⁹

5. On March 4, 2014, Geodesic, through its frequency coordinator Radyn, Inc., sent a PCN seeking to coordinate a 6 GHz path between Naperville, Illinois and Chicago, Illinois.¹⁰ Geodesic requested an expedited response date of March 19, 2014.¹¹ The PCN stated, “If a response is not received within 15 days of the date of this letter, we will assume that there are no objections to this proposal.”¹² Auburn did not reply to Geodesic’s PCN by March 19, 2014.¹³ On March 20, 2014, Geodesic, through Radyn, issued a PCN to make minor modifications to the March 4, 2014 PCN.¹⁴

6. On March 26, 2014, Geodesic filed applications for the paths and frequencies it had coordinated in its March 4 and March 20 PCNs.¹⁵ Also on March 26, 2014, Comsearch, Auburn’s frequency coordinator, issued a letter notifying Geodesic’s frequency coordinator of “great circle interference conflicts” which may result from Geodesic’s proposal.¹⁶ On March 31, 2014, Geodesic, through coordinator Radyn, responded to Auburn and stated that Geodesic considers the interference case resolved for the following reasons:

Our customer has an immediate need for these frequencies. Your client’s path has been renewed without application for over two years. We respectfully request that your client relinquish the frequencies (sic) in renewal for the path Aurora – Darien (frequencies 6197.24H – 5945.2H).¹⁷

⁶ See 47 C.F.R. § 101.21(f).

⁷ 47 C.F.R. § 101.103(d)(2)(ii).

⁸ See Letter from Tom Detrick, Pinnacle Telecom Group (dated Oct. 24, 2011) (attached as Exhibit B to Opposition to Contingent Petition for Reconsideration and Petition to Deny, Geodesic Networks, LLC (filed May 12, 2014) (Geodesic Opposition)).

⁹ See Letters from Tom Detrick, Pinnacle Telecom Group (dated Apr. 23, 2012, Oct. 4, 2012, Sep. 13, 2013, Mar. 12, 2014) (attached as Exhibits C-1 through C-4 of Geodesic Opposition).

¹⁰ Prior Coordination Notice, Radyn, Inc., Ref. No. PCN14345RDI14 (Mar. 4, 2014) (attached as Exhibit D to the Geodesic Opposition) (Geodesic PCN).

¹¹ *Id.*

¹² *Id.*

¹³ Geodesic Opposition at 3.

¹⁴ Prior Coordination Notice, Radyn, Inc., Ref. No. PCN14345RDI14 (Mar. 20, 2014) (attached as Exhibit E to the Geodesic Opposition).

¹⁵ File Nos. 0006213842, 0006213843 (filed Mar. 26, 2014).

¹⁶ Letter from David L. Wiggins, Comsearch, to Frequency Coordinator, Radyn, Inc. (dated Mar. 26, 2014) (attached as exhibit to Petition for Reconsideration and Contingent Petition to Deny, Auburn Data Systems, LLC (filed May 2, 2014) (Auburn Petition)).

¹⁷ Letter from Radyn, Inc. to Frequency Coordinator, Comsearch, Incorporated (dated Mar. 31, 2014) (attached as Exhibit A to the Geodesic Opposition).

On April 29, 2014, the Wireless Telecommunications Bureau (“Bureau”) granted Geodesic’s applications and issued licenses under call signs for Naperville, Illinois as call sign WQTX438 (Naperville to Chicago) and WQTX439 (Chicago to Naperville).¹⁸ Also on April 29, 2014, Auburn filed applications for the paths and frequencies for which it had previously sent PCNs.¹⁹

7. On May 2, 2014, Auburn filed a petition arguing that the Bureau prematurely granted Geodesic’s application for Station WQTX438 without waiting thirty days after those applications were placed on public notice.²⁰ In addition, Auburn argued that Geodesic failed to successfully complete frequency coordination in response to Auburn’s report of potential interference between Geodesic’s proposed design and Auburn’s growth channels.²¹ Auburn stated that it had declined to relinquish the frequencies as Geodesic requested.²²

8. On May 21, 2014, Geodesic filed a petition to deny against Auburn’s applications for fixed point-to-point microwave licenses at Naperville, Illinois and Darien, Illinois.²³ Geodesic argues that Auburn was required to relinquish the frequencies in question for Geodesic’s use pursuant to Section 101.103(d)(2)(xii) of the Commission’s rules.²⁴ Geodesic also argues that Auburn failed to timely respond to Geodesic’s PCN.²⁵ Geodesic also accuses Auburn of a pattern of warehousing spectrum.²⁶ Geodesic contends that Auburn’s applications should be dismissed because they conflict with Geodesic’s earlier-filed and granted applications.²⁷ In response, Auburn repeats its argument that Geodesic’s application was improperly filed over Auburn’s objection to Geodesic’s PCN.²⁸ Auburn argued that its lack of a response to Geodesic’s PCN by the expedited response date did not indicate Auburn’s consent to the PCN.²⁹ Further, Auburn argued that a “responsible applicant,” upon receiving Auburn’s “timely objection” would have immediately withdrawn the application until the interference case was resolved, instead of leaving the application in place and certifying that frequency coordination had been completed.³⁰

III. DISCUSSION

9. Auburn’s and Geodesic’s pleadings raise four issues that we must address. First, we conclude that the Bureau did not prematurely grant Geodesic’s applications. Second, Geodesic acceptably completed frequency coordination of its proposed operations, and it was not required to withdraw its applications once Auburn objected after the date Geodesic requested a response. Third, under the specific facts presented here, Section 101.103(d)(2)(xii) of the Commission’s rules required Auburn to relinquish the frequencies in question once Geodesic made that request. Finally, we must dismiss Auburn’s applications, which Auburn admits are mutually exclusive with Geodesic’s

¹⁸ File Nos. 0006213842, 0006213843 (granted Apr. 29, 2014).

¹⁹ File Nos. 0006261839 and 0006261845 (filed Apr. 29, 2014).

²⁰ See Auburn Petition at 1-2.

²¹ See Auburn Petition at 2-3.

²² See Auburn Petition at 3.

²³ Petition to Deny, Geodesic Networks LLC (filed May 21, 2014) (Geodesic Petition).

²⁴ Geodesic Petition at 3-5.

²⁵ Geodesic Petition at 5-6.

²⁶ Geodesic Petition at 8-9.

²⁷ Geodesic Petition at 2-3.

²⁸ Opposition to Petition to Deny, Auburn Data Systems, LLC (filed June 3, 2014) (Auburn Opposition) at 3-4.

²⁹ Auburn Opposition at 3.

³⁰ Auburn Opposition at 4.

applications,³¹ because they were filed after Geodesic's properly granted applications.

10. *Public Notice.* Auburn argues that the Commission's grant of Geodesic's license for Call Sign WQTX438 was premature, having come before the end of the 30-day public notice period specified in Section 1.945(b) of the Commission's rules.³² Auburn argues that the text of the Commission's public notice listing Geodesic's application stated: "Below is a listing of applications, subject to the pre-grant notice and petition procedure of Section 309 of the Communications Act of 1934, as amended, that were accepted for filing."³³ Auburn, therefore, expected that the Commission would not grant Geodesic's application prior to the deadline for filing petitions to deny.³⁴

11. We disagree. Auburn had no right to file a petition for reconsideration or petition to deny against Geodesic's application because applications for private microwave licenses are not subject to the public notice requirement nor the petition to deny requirement set forth in Section 309(b) and 309(d)(1) of the Communications Act of 1934, as amended.³⁵ Therefore, Section 1.945(b) of the Commission's rules is inapplicable here. As Geodesic observed, a 1996 statutory amendment removed private fixed point-to-point microwave applications from Section 309(b) of the Communications Act, which lists the kinds of applications subject to the 30-day public notice period.³⁶ As the Commission explained in 1996, "Section 403(j) of the Telecommunications Act of 1996 eliminates the thirty-day public notice and comment period for private fixed point-to-point microwave applications...in order to provide expedited licensing for this service."³⁷ The Commission reaffirmed its approach in 2000, stating that it "decline[d] to reinstate the requirement that private that [private microwave] applications be placed on public notice thirty days prior to the date the application is granted..."³⁸ Although Congress and the Commission removed private microwave applications from the thirty-day public notice requirement, the Commission explained that it continues to release an informal listing of such applications as a resource for interested parties.³⁹

12. *Geodesic's Compliance with Frequency Coordination Procedures.* Section 101.103(d)(1) of the Commission's Rules provides in pertinent part, that

Proposed frequency usage must be prior coordinated with existing licensees, permittees

³¹ See Auburn Opposition at 1.

³² Auburn Petition at 1-2. 47 C.F.R. § 1.945(b) states: "No application that is not subject to competitive bidding under §309(j) of the Communications Act will be granted by the Commission prior to the 31st day following the issuance of a Public Notice of the acceptance for filing of such application or of any substantial amendment thereof, unless the application is not subject to §309(b) of the Communications Act."

³³ Auburn Opposition at 5 (*citing* Wireless Telecommunications Bureau Site-By-Site Accepted for Filing, Report No. 9468A, *Public Notice* (released Apr. 2, 2014) at 1).

³⁴ Auburn Opposition at 5-6. We note that Auburn's pleading only references Geodesic's File No. 0006261845 and did not challenge Geodesic's other application (granted as Call Sign WQTX439) in the same geographic area.

³⁵ See 47 C.F.R. § 1.933(d)(9). See also, Touch Tel Corporation, *Order on Reconsideration*, 26 FCC Rcd 16482, 16485 ¶ 8 (WTB BD 2011). For the same reason, we will not accept the Geodesic Petition as a petition to deny but treat the pleading as an informal objection. See 47 C.F.R. § 1.41.

³⁶ The Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 (1996).

³⁷ Reorganization and Revision of Parts 1, 2, 21 and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services, *Report and Order*, 11 FCC Rcd 13449, 13478 ¶ 82 (1996) (*Part 101 Report & Order*).

³⁸ Reorganization and Revision of Parts 1, 2, 21, and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 15 FCC Rcd 3129, 3138-3140 ¶¶ 14-16 (2000) (*Part 101 MO&O*).

³⁹ *Part 101 MO&O*, 15 FCC Rcd at 3140 ¶ 16.

and applicants in the area, and other applicants with previously filed applications, whose facilities could affect or be affected by the new proposal in terms of frequency interference on active channels, applied-for channels, or channels coordinated for future growth. Coordination must be completed prior to filing an application for regular authorization, or an amendment to a pending application, or any major modification to a license. . . . All applicants and licensees must cooperate fully and make reasonable efforts to resolve technical problems and conflicts that may inhibit the most effective and efficient use of the radio spectrum; however, the party being coordinated with is not obligated to suggest changes or re-engineer a proposal in cases involving conflicts. Applicants should make every reasonable effort to avoid blocking the growth of systems as prior coordinated. . . . In the event that technical problems are not resolved, an explanation must be submitted with the application.⁴⁰

13. Geodesic substantially complied with the frequency coordination procedures. On March 4, 2014, Geodesic issued a PCN to Auburn for the proposed paths at issue.⁴¹ Geodesic asked for an expedited response within 15 days and indicated that if it received no response, Geodesic would assume that there were no objections to the proposal.⁴² Section 101.103(d)(2)(vi) of the Commission's rules states:⁴³

An expedited prior coordination period (less than 30 days) may be requested when deemed necessary by a notifying party. The coordination notice should be identified as "expedited" and the requested response date should be clearly indicated. However, circumstances preventing a timely response from the receiving party should be accommodated accordingly. It is the responsibility of the notifying party to receive written concurrence (or verbal, with written to follow) from affected parties or their coordination representatives.

Auburn argues that it was under no obligation to honor or to respond to Geodesic's request for expedited consideration.⁴⁴ We disagree with Auburn that it was appropriate to simply ignore Geodesic's request for expedited consideration. Auburn's decision to ignore the request for expedited consideration is inconsistent with the requirement that "[r]esponse to notification should be made as quickly as possible, even if no technical problems are anticipated."⁴⁵ If Auburn had informed Geodesic that it needed additional time to evaluate the proposed facilities or to prepare its response, Geodesic would have been obliged to accommodate that request. Auburn, however, chose not to respond. We also do not view the last sentence of Section 101.103(d)(2)(vi) of the Commission's rules as absolving Auburn of its duty to respond to the request for expedited coordination. "Every reasonable effort should be made by all applicants, permittees and licensees to eliminate all problems and conflicts."⁴⁶ Auburn's argument that the last sentence of Section 101.103(d)(2)(vi) places the sole burden on Geodesic is inconsistent with the basic principle that all applicants and licensees must work together to resolve issues. While the better practice would have been for Geodesic to affirmatively contact each licensee and applicant prior to filing, we decline to deem its coordination fatally defective in light of its explicit statement that it would assume there were no objections if it did not receive a response.

⁴⁰ 47 C.F.R. § 101.103(d)(1).

⁴¹ Geodesic PCN.

⁴² Geodesic PCN.

⁴³ 47 C.F.R. § 101.103(d)(2)(vi).

⁴⁴ See Auburn Opposition at 3.

⁴⁵ See 47 C.F.R. § 101.103(d)(2)(iv).

⁴⁶ 47 C.F.R. § 101.103(d)(2)(iv).

14. At the end of the response period, Geodesic had not received any response to its PCN. Accordingly, it acted reasonably in filing its application at that time. We therefore decline to set aside the grant of Geodesic's applications on the basis that its frequency coordination was defective.

15. *Request to Relinquish Growth Channels.* Our conclusion that Geodesic's applications complied with the frequency coordination requirement at the time they were filed does not preclude us from considering Auburn's subsequent objections, which were based on its prior PCNs. Since the parties agree that Auburn's proposed facilities and Geodesic's facilities are mutually exclusive,⁴⁷ it is not possible to grant both sets of applications. Normally, since Auburn coordinated its proposed facilities first, Geodesic would be required to successfully coordinate its facilities with Auburn.⁴⁸ In response to Auburn's objection, Geodesic requested that Auburn relinquish the channels in question pursuant to Section 101.103(d)(2)(xii) of the Commission's rules. We conclude that Auburn was required to honor Geodesic's request to relinquish the frequencies and that Auburn therefore has no rights in those frequencies.

16. When Geodesic filed its application, Auburn had been holding its growth channels for approximately 2.5 years without building out the frequencies. When the Commission enacted Section 101.103(d)(2)(xii), it contemplated that growth channels would be held for "months," not years.⁴⁹ The Commission specifically stated that, under this rule, "reserve growth channels should be made available to another applicant upon a demonstration of need."⁵⁰ We interpret the filing of Geodesic's application for a frequency as a demonstration of its need. If one party is willing to file an application and start the clock ticking on the construction requirement, and another party has not, then the former has shown a greater need for the frequency. Here, Geodesic properly filed an application for the frequencies before Auburn filed such an application.

17. "[A]ny party needing to hold growth channels for longer than six months must demonstrate a need for them in the event that another entity is unable to clear another channel."⁵¹ Auburn's argument that its "renewals of its PCNs reflected nothing more than the time needed to design and construct its large and complex system"⁵² is not an adequate showing of need. A review of the Universal Licensing System shows that Auburn filed 122 applications for new or modified facilities within the three year period after they coordinated the path in question. It appears that Auburn did not have an immediate need for the path in question and prioritized other facilities.⁵³

18. Geodesic argues that the *Asia Skylink*⁵⁴ case controls this situation,⁵⁵ while Auburn contends that *Asia Skylink* is factually distinguishable from this case.⁵⁶ While Auburn is correct that there

⁴⁷ See Geodesic Petition at 2-3; Auburn Opposition at 1.

⁴⁸ See 47 C.F.R. § 101.103(d)(1) (coordination requirement includes licensees whose facilities could be affected by interference on "channels coordinated for future growth").

⁴⁹ *Part 101 Report & Order*, 11 FCC Rcd at 13473 n.102.

⁵⁰ *Part 101 Report & Order*, 11 FCC Rcd at 13474 ¶ 66.

⁵¹ *Part 101 Report & Order*, 11 FCC Rcd at 13474 ¶ 66.

⁵² Reply of Auburn Data Systems to the Opposition of Geodesic Networks LLC to Petition for Reconsideration and Contingent Petition to Deny (filed May 19, 2014) at 1.

⁵³ Our analysis is limited to the facts concerning these specific paths. We do not address Geodesic's allegations that Auburn has engaged in a broader pattern of warehousing, or Auburn's response to those allegations.

⁵⁴ See *Asia Skylink, Inc., Memorandum Opinion and Order*, DA 99-2965 (WTB PS&PWD rel. Dec. 23, 1999) (*Asia Skylink*).

⁵⁵ Geodesic Petition at 6.

⁵⁶ Auburn Opposition at 4.

are some factual differences between the two cases, those differences do not support a different result in this case. The fact that Geodesic requested expedited coordination is irrelevant because, as explained above, Geodesic's coordination was not defective. Auburn is correct that the existing licensee was reserving channels for a longer time than Auburn, but Auburn's attempt to reserve channels for 2.5 years is still a longer period than the Commission contemplated. Finally, Auburn is incorrect when it claims that it timely opposed Geodesic's PCN and applications.⁵⁷ In *Asia Skylink*, the former Public Safety and Private Wireless Division observed: "An existing licensee who is trying to protect its growth channels may not dictate what the incoming applicant should do, and effectively engineer the new applicant's system."⁵⁸ We believe that allowing Auburn to hang on to these frequencies after doing nothing for 2.5 years would be inconsistent with that guidance. We therefore conclude that Auburn was required to relinquish the frequencies.

19. *Auburn's Applications.* Because Geodesic's applications were properly filed and granted, we must dismiss Auburn's mutually exclusive applications. In the Private Operational Fixed Microwave Service, an application must be filed on the same day as another application to be considered as a mutually exclusive application.⁵⁹ Otherwise, the later-filed application must be dismissed without prejudice.⁶⁰

IV. CONCLUSION AND ORDERING CLAUSES

20. The Bureau did not prematurely act on Geodesic's applications because those applications were not subject to the thirty-day public notice period contained in Section 309(b) of the Communications Act. Geodesic properly filed its applications and met the fundamental requirements of Section 101.103 of the Commission's rules pertaining to frequency coordination. Auburn was required to relinquish the frequencies pursuant to Section 101.103(d)(2)(xii) of the Commission's rules. Since Geodesic's applications were properly filed and granted, we must dismiss Auburn's later-filed applications.

21. Accordingly, IT IS ORDERED that pursuant to Sections 4(i), 309, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and 405, and Sections 1.106 and 1.939 of the Commission's rules, 47 C.F.R. §§ 1.106, 1.939, that the Petition for Reconsideration and Contingent Petition to Deny filed by Auburn Data Systems, LLC on May 2, 2014 IS DISMISSED as a petition to deny and IS DENIED as a petition for reconsideration.

22. IT IS FURTHER ORDERED that pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.41 and 1.939 of the Commission's rules, 47 C.F.R. §§ 1.41, 1.939, that the Petition to Deny filed by Geodesic Networks, LLC on May 21, 2014 IS DISMISSED as a petition to deny and IS GRANTED as an informal objection.

23. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Section 1.934 of the Commission's Rules, 47 C.F.R. § 1.946, that the licensing staff of the Broadband Division SHALL

⁵⁷ Auburn Opposition at 4.

⁵⁸ *Asia Skylink* at n.52.

⁵⁹ See 47 C.F.R. § 1.227(b)(4).

⁶⁰ See 47 C.F.R. § 1.227(b)(5).

DISMISS the applications filed by Auburn Data Systems, LLC on April 29, 2014 (File Nos. 0006261839 and 0006261845).

24. These actions are taken pursuant to the authority delegated by Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

John J. Schauble
Deputy Chief, Broadband Division
Wireless Telecommunications Bureau